No. 49163-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BRICE NOWACKI, Appellant.

Appeal from the Superior Court of Cowlitz County
The Honorable Michael H. Evans
No. 15-1-00860-6

BRIEF OF APPELLANT BRICE NOWACKI

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III. STATEMENT OF THE CASE

Mr. Nowacki was convicted, after a jury trial, of one count of forgery and one count of making a false statement. He appeals his convictions.

1. Facts.

Justin Dunaway had several checks from Nichole Brese's closed checking account. (RP 94, 127). Mr. Dunaway asked Austin

Malakowsky to cash checks for him because he didn't have an account and needed help. (RP 128). Mr. Malakowsky testified that he was able to cash the checks with no problem, and thought they were legitimate. (RP 130). However, after the third check, Mr. Dunaway told him the checks were fake and it was forgery. (RP 13). Mr. Dunaway continued cashing the checks, after he knew they were forged. (RP 130). Mr. Dunaway paid Mr. Malakowsky a portion of every check he cashed. (RP 130). Mr. Malakowsky was charged and pleaded guilty. (RP 138).

Mr. Malakowsky was friends with Brice Nowacki. (RP 126). Mr. Nowacki met Mr. Dunaway when he was in a car with Mr. Dunaway and Mr. Malakowsky; at the time, he did not know Mr. Dunaway's name. (RP 156). Mr. Malakowsky told Mr. Nowacki that he'd been cashing checks for a guy who needed help. (RP 131-32). Mr. Nowacki was skeptical at first, but Mr. Malakowsky told him it was legit and legal and offered to pay him to cash the checks. (RP 131-32, 157). There was no specific amount agreed on and Mr. Nowacki testified that he decided to help his friend and did not expect to get paid. (RP 157). Mr. Malakowsky assured him that it was safe and it was legal. (RP 157).

A couple days later, on July 30, 2015, Mr. Malakowsky met with Mr. Dunaway, who gave him two checks, one made out to Mr. Malakowsky, and one made out to Mr. Nowacki. (RP 132-33). Then, Mr.

Malakowsky picked up Mr. Nowacki and gave him one of the checks to cash. (RP 132-33, 159). Mr. Nowacki testified that he had never cashed a check before, he glanced at it and noticed his name was misspelled, but otherwise didn't look at it closely. (RP 159-60).

Mr. Nowacki went into the bank, gave the check and his identification to the teller, told her he was cashing a check for a friend, who he referred to with male pronouns, such as "him," and told her his name was misspelled. (RP 68-71, 161-62). The check was made out to Brice Caski, the date said 7 of 2015, and the memo line said "for work." (RP 71). The teller asked Mr. Nowacki about his friend, because the name on the check was Nichole Brese; Mr. Nowacki maintained his friend was male. (RP 72).

The teller found the check suspicious, so she called the bank the check was from and went to her manager. (RP 72). The manager called the bank again, and then called the police. (RP 75). Mr. Nowacki waited for 15-20 minutes, then went outside to smoke. (RP 163). He had a cigarette in his hand. (RP 176). As he was walking outside, he ran into Sergeant Neves. (RP 102). The officer testified that Mr. Nowacki avoided eye contact and appeared nervous. (RP 102). Later, he testified that Mr. Nowacki was extremely nervous. (RP 177).

Sergeant Neves asked Mr. Nowacki what he was doing, and he

told him that he was there to cash a check. (RP 106-07). The officer told him that was why he was there too; Mr. Nowacki responded, "Shit, I just knew it." (RP 104). He told the officer he was cashing a check for a friend and then pointed out Mr. Malakowsky. (RP 105-06). The officer asked Mr. Nowacki to come back into the bank with him and he did. (RP 108). After speaking with the teller, the officer detained Mr. Nowacki. (RP 109).

Mr. Nowacki told the officer he was cashing the check for a male friend who didn't have an account who was named Nichole, he told the officer that Mr. Malakosky had cashed several checks for Nichole. (RP 110).

Another officer had arrived and contacted Mr. Malakowsky. (RP 106-07). Sergeant Neves re-contacted Mr. Nowacki who apologized for lying about knowing Nichole, he said didn't want to get in trouble, and that he actually got the check from Mr. Malakowsky. (RP 114). Mr. Nowacki testified that he didn't know Mr. Dunaway's name and thought it was Nichole because that was the name on the check, he only lied about knowing him. (RP 166-67). Mr. Nowacki said he should've listened to his mom who told him it wasn't a good idea. (RP 115). Later, Mr. Nowacki was shown a photo of Mr. Dunaway and his name was on the photo; that is how he learned Mr. Dunaway's name. (RP 115). Mr. Nowacki

identified Mr. Dunaway as the person who gave them the checks. (RP 115-16).

2. Smith Affidavits.

At trial, the State moved to admit Mr. Malakowsky's prior statements to law enforcement (Exh. 2[1]) and to a defense investigator (Exh.3) during its cross-examination of Mr. Malakowsky. (RP 145-46). Defense counsel objected as to lack of foundation for a *Smith* affidavit. (RP 145-46). The court admitted both statements over objection. (RP 145-47). The State stated no basis for the admission, and the court stated no reason for their admission. (RP 145-47).

At that time, Mr. Malakowsky had already admitted on cross-examination that he did not previously tell law enforcement that he had to talk Mr. Nowacki into cashing the checks and that Mr. Nowacki did not know the checks were stolen, but the State attempted to use the statements to impeach Mr. Malakowsky regarding his failure to exculpate Mr. Nowacki at the time of his arrest. (RP 143-47).

The only foundational questions asked regarding the circumstances under which the statement was made to law enforcement were:

> Q Okay. And then even when you and your friend were arrested and brought to the jail, do you remember filling a written statement for Officer Jeff

[1] Exhibits 2 and 3 have been designated, but have not been filed. Counsel obtained the exhibits independently, but does not have CP pages to cite to at this time.

Gann?

A Yeah.

Q And I'm going to show you what's marked as State's Exhibit No. 2. (Counsel provides Exhibit to witness.)

Q (By Mr. Nguyen:) Does this look familiar to you?

A (Witness reviews Exhibit.) Yes.

Q That's your statement that you gave to Officer Jeff Gann on July 30th of 2015; right?

A Um-hum.

Q Correct?

A Yes.

(RP 143). Officer Gan only testified during the State's rebuttal. (RP 184).

His testimony regarding the statement consisted of:

Q Okay. And then at the jail did you -- what did you do with regards to those two individuals?

A I obtained written statements from them.

Q Okay. I'm going to show you what's admitted State's Exhibit No. 2. (Counsel provides Exhibit to witness.)

Q (By Mr. Nguyen:) Does that look familiar to you?

A (Witness reviews Exhibit.) Yes.

Q And that's the written statement of who?

A Austin Malakowsky.

Q And was that one of the statements you obtained back on July 30th of 2015?

A Yes, it was.

(RP 185). The testimony was objected to as improper rebuttal testimony, but was allowed. (RP 186).

Exhibit 3 was a statement made to a defense investigator, after Mr. Malakowsky had been arrested and pleaded guilty to charges stemming from this incident. (Exh. 3, RP 145).

3. Opinion Testimony.

The State re-called Sergeant Neves and asked him if people always confess to crimes; the officer answered, "Most people lie to the police – they don't confess." (RP 182). The State then asked if Mr. Nowacki ever said he knew the check was fake; the officer said, "I don't recall him ever telling me that." (RP 182).

4. Closing Arguments.

The State, in its closing arguments, argued, "First of all, we know the check, in and of itself, is off of an email account photo." (RP 21). These facts were not in evidence; there was no objection. The State also argued that Mr. Nowacki said, "I have a guy friend, Nichole, who has a fellow by the name, Ron." (RP 25). These facts were not in evidence; there was no objection.

I. ARGUMENT

1. The Prior Written Statements by Mr. Malakowsky Were Hearsay and Should Not Have Been Admitted.

Mr. Nowacki objected to exhibits 2 and 3, Mr. Malakowsky's prior statements, arguing that the State had not laid the proper foundation for the admissibility of a *Smith* affidavit. The court admitted both statements, over objection. The court improperly admitted the statements, because they do not meet the criteria for admission of a *Smith* affidavit under ER 801(d)(1)(i).

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Magers,* 164 Wash.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell,* 120 Wash.2d 822, 830, 845 P.2d 1017 (1993). However, appellate courts review the interpretation of evidentiary rules de novo. *State v. DeVincentis,* 150 Wash.2d 11, 17, 74 P.3d 119 (2003).

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless a specific exception applies. ER 802. Prior inconsistent statements are

admissible, and not hearsay, only if they are offered to challenge the declarant's credibility rather than for the truth of the matter asserted. *State v. Williams,* 79 Wash.App. 21, 26, 902 P.2d 1258 (1995).

Under ER 801(d)(1)(i) a statement made under penalty of perjury may be admitted as substantive evidence under certain circumstances.

> A statement is not hearsay if . . .
>
> > The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or *other proceeding*, or in a deposition ...

ER 801(d) (emphasis added). These sworn statements are commonly referred to as *Smith* affidavits. *See State v. Smith*, 97 Wash.2d 856, 651 P.2d 207 (1982).

a. *Mr. Malakowsky' Statements Were Not Admissible as Smith Affidavits Because the Statements Were Not Made at "Other Proceedings."*

To determine whether an affidavit is admissible, the courts consider four factors:

> (1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness; (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement.

State v. Thach, 126 Wash. App. 297, 308, 106 P.3d 782, 788 (2005). Not all affidavits signed under penalty of perjury are admissible as "other proceedings." *Smith*, 97 Wash.2d at 861.

In *Smith*, the court found that the statement was voluntary and there were minimal guarantees of truthfulness where it was made under oath and subject to penalty of perjury, it was notarized, and it was written by the witness. *Smith*, 97 Wash. 2d 856. In *Thach*, the affidavit was admissible where the witness completed part of the affidavit herself and signed it under penalty of perjury. *Thach*, 126 Wash. App. at 308. In *Nelson*, a prior sworn statement was found reliable and admitted where, although the witness did not write the statement herself, she testified that she made a statement, the officer wrote her statement, and she read it before signing it. *State v. Nelson*, 74 Wash. App. 380, 389, 874 P.2d 170, 175 (1994).

However, in *Nieto*, the court held that a statement was not admissible because it did not contain the minimum guarantees of truthfulness where it was written on a pre-printed printed form with ambiguous boilerplate language that the statement was under the penalty of perjury, there was no notary present, there were no other formal procedures, and the witness testified that she did not read the language regarding the statement being under the penalty of perjury, it had no

meaning to her, and no one read it to her. *State v. Nieto*, 119 Wash. App. 157, 163, 79 P.3d 473, 477 (2003).

Exhibit 2 appears to have been made to law enforcement for the purpose of establishing probable cause and the form stated that it was under oath and subject to penalty of perjury. However, it was not notarized and it was not signed by any witness. The statement was admitted, over objection, during cross-examination of Mr. Malakowsky, before the officer testified. At that time, there had been no testimony regarding how the statement was completed, who wrote it, the circumstances leading up to it, whether Mr. Malakowsky read it or whether it was read to him. There was no foundation for the court to determine if the statement was made voluntarily and with minimal guarantees of truthfulness when there is almost no information in the record regarding how the statement was made.

Exhibit 3 was a statement made to a defense investigator after Mr. Malakowsky pleaded guilty. The prior out of court statement was clearly hearsay. Unlike, Exhibit 2, which was made to law enforcement during its investigation, this statement was clearly not made "at a trial, hearing, or *other proceeding* . . ." under ER 801(d)(1)(i) because it was not for the purposes of determining probable cause. The statement was made to a defense investigator, not law enforcement, and it was made after Mr.

Malakowsky had already been arrested, charged, and pleaded guilty. Therefore, there was no basis to admit the statement. Therefore, the trial court erred by admitting the statements.

b. *Mr. Malakowsky's Statements Were Not Prior Inconsistent Statements.*

Even if Mr. Malakowsky's statements are considered statements "given under oath subject to the penalty of perjury at a trial, hearing or other proceeding" under *Smith*, the statements are only admissible if it is *inconsistent* with the testimony at trial.

> A statement is not hearsay if . . .
>
> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . *inconsistent with his testimony,* and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition ...

ER 801(d) (emphasis added).

This year, our Supreme Court affirmed *Smith* in *Otton*, where a sworn statement was admitted after the victim in a domestic violence case testified that her prior statement to the police was false. *State v. Otton*, 185 Wash. 2d 673, 676, 374 P.3d 1108, 1110 (2016). In *Smith*, the victim's sworn statement implicating the defendant was admitted after the victim testified at trial that another man, not the defendant, assaulted her. *Smith*, 97 Wash. 2d at 857. It does not appear that there are any cases

where a *Smith* affidavit was admitted under ER 801(d)(i) where the witness' testimony was not clearly inconsistent with the prior sworn statement.

While the court in *Allen S.* said it was not addressing admissibility under ER 801(d)(1)(i), the analysis regarding whether or not a statement is inconsistent is the same. *State v. Allen S.*, 98 Wn. App. 452, 466, 989 P.2d 1222, 1230 (1999). And, in *State v. Robbins*, the exclusion of a sworn statement was affirmed, in part, because there was no inconsistent statement when the witness refused to testify. *State v. Robbins,* 25 Wash.2d 110, 169 P.2d 246 (1946).

In this case, Mr. Malakowsky's testimony at trial was not inconsistent with his statement to the police. Exhibit 2 was only inconsistent insofar as Mr. Malakowsky testified that he did learn the checks were fake prior to the date of this incident, where his prior statement was that he did not know they were fake. However, the State admitted the statement for the purpose of impeaching Mr. Malakowsky with his failure to tell police that he had to talk Mr. Nowacki into cashing the checks. That testimony is not inconsistent with his statement to law enforcement in that regard.

Exhibit 3, stating that he conned Mr. Nowacki into cashing the check and that Mr. Nowacki didn't know the check was fake, was consistent with Mr. Malakowsky's testimony at trial.

Therefore, Mr. Malakowsky' testimony at trial was not inconsistent with his prior statement; and, therefore, the prior statements were not admissible under ER 801(d)(i).

2. Mr. Nowacki Was Denied His Right to a Fair Trial When the Officer Improperly Testified Regarding His Opinion on Mr. Nowacki's Veracity and Guilt.

a. Improper Opinion Testimony Regarding Veracity and Guilt is a Manifest Error Effecting a Constitutional Right and Can Be Considered for the First Time on Appeal.

Manifest errors effecting constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3). When a police officer makes an explicit or almost explicit comment that he believes that the defendant is guilty, the error can be raised for the first time on appeal. *See State v. Kirkman*, 159 Wn.2d 918, 936-7, 155 P.3d 125 (2007); *see also State v. Dolan*, 118 Wn.App. 323, 73 P.3d. 1011 (2003) (improper testimony of CPS worker and police officer that they didn't believe the mother was responsible for injuries to child, implying that the defendant was responsible, allowed to be considered for the first time on appeal).

Improper opinion testimony regarding a defendant's guilt affects his or her right to a fair trial and a trial by jury. "The right to a fair trial is

a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." *In re Glasmann*, 175 Wash. 2d 696, 703-04, 286 P.3d 673, 677 (2012), *citing Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch,* 137 Wash.2d 792, 843, 975 P.2d 967 (1999); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV. Furthermore, the right to have factual questions decided by the jury is crucial to the right to trial by jury. WASH. CONST. art I, §§ 21, 22, U.S. CONST. amend. VII. "The role of the jury is to be held 'inviolate' under Washington's constitution." *State v. Montgomery*, 163 Wash. 2d 577, 590, 183 P.3d 267, 273 (2008). One factor courts consider in determining whether a constitutional issue may be raised for the first time on appeal is the prejudice to the defendant. *Id.* at 595-6.

In this case, the officer testified that most people lie to the police and that Mr. Nowacki never told him that he knew the check was forged. In context, this was a comment on Mr. Nowacki's guilt and veracity, clearly implying that Mr. Nowacki knew the check was forged and was untruthful by failing to tell the officer that he knew the check was forged. This was extremely prejudicial because the issues at trial were whether Mr. Nowacki knew the check was forged and his credibility. The

violation of Mr. Nowacki's right to a fair trial by jury is a manifest constitutional right that should be considered for the first time on appeal.

b. The Officer's Improper Opinion Testimony Regarding Mr. Nowacki's Veracity and Guilt Denied Mr. Nowacki His Constitutional Right to a Fair Trial by Jury.

"Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference." *State v. Farr-Lenzini*, 93 Wash. App. 453, 459-60, 970 P.2d 313, 318 (1999), citing *State v. Black,* 109 Wash.2d 336, 348, 745 P.2d 12 (1987); *State v. Garrison,* 71 Wash.2d 312, 315, 427 P.2d 1012 (1967). Such impermissible opinion testimony about a defendant's guilt may constitute reversible error because it violates the defendant's constitutional right to a jury trial, which includes independent determination of the facts by the jury. *Id.*; State *v. Kirkman*, 159 Wash. 2d at 927.

Washington courts, as well as federal courts, have long recognized the inherent danger in admitting opinion testimony of law enforcement officers. *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) (statement made by a government official or law enforcement officer is more likely to influence the fact finder), overruled on other grounds by *City of Seattle v. Heatley,* 70 Wash.App. 573, 854 P.2d 658 (1993); *United States v. Gutierrez*, 995 F.2d 169, 172 (9th Cir. 1993) (statements of law

enforcement officers often carry "an aura of special reliability and trustworthiness"), quoting *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir. 1987); *State v. Demery*, 144 Wash. 2d 753, 765, 30 P.3d 1278, 1285 (2001) (police officer's testimony carries an "aura of reliability"); *State v. Barr*, 123 Wn. App. 373, 381, 98 P.3d 518 (2004) (law enforcement officer's opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial). Furthermore, "police officers' opinions on guilt have low probative value because their area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt." *Montgomery*, 163 Wash. 2d at 595.

In this case, the officer testified that most people lie to the police; they don't confess. And, then, he went on to say that Mr. Nowacki never said that he knew the check was fake. Thus, the officer implied that Mr. Nowacki lied to him and he knew the check was fake. This is a comment on Mr. Nowacki's guilt and veracity. This testimony was extremely prejudicial because it came from a police officer and because of the circumstantial nature of this case. Given the prejudicial nature of the testimony, this matter should be reversed and remanded for a new trial.

3. The State Committed Prosecutorial Misconduct by Arguing Facts Not in Evidence.

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced her defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied,* 100 Wn.2d 1008 (1983). A defendant's constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005).

It is improper for the State to argue facts that are not in evidence. *State v. Jones*, 144 Wash. App. 284, 294, 183 P.3d 307, 313 (2008). In this case, the State argued to the jury that "we know the check . . . is off an email account photo." (RP 21). However, there was nothing in evidence about the check being from an email account photo. Also, the State argued that Mr. Nowacki said that, "I have a guy friend, Nichole, who has a fellow by the name, Ron." That statement was not in evidence. Where

the issues at trial were whether or not Mr. Nowacki knew the check was forged and his credibility, these improper arguments were prejudicial. Therefore, this matter should be reversed and remanded for a new trial.

4. Mr. Nowacki Received Ineffective Assistance of Counsel Because Counsel Did Not Object to the Officer's Improper Opinion Testimony or to the State Arguing Facts Not in Evidence.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Sutherbv.* 165 Wash.2d 870, 883, 204 P.3d 916 (2009).

As discussed above, the officer improperly testified regarding Mr. Nowacki's veracity and guilt by stating that most people lie to the police and Mr. Nowacki never told the officer that he knew the checks were forged. In addition, the State's closing argument, arguing facts not in evidence, was improper. Defense counsel did not object to the improper testimony or argument. Failure to object was clearly unreasonable in this case as there was no strategic reason to fail to object to the State arguing facts not in evidence. As argued above, Mr. Nowacki was prejudiced because the State's arguments went directly to the disputed issues in this case, whether Mr. Nowacki knew the check was forged and his credibility. Therefore, the conviction should be reversed and remanded.

5. This Court Should Not Impose Appellate Costs Because Mr. Nowacki is Indigent and Unable to Pay.

This Court has discretion on whether or not to impose appellate costs in a criminal case. *State v. Sinclair*, 192 Wash. App. 380, 389-90, 367 P.3d 612, 616 (2016); *see also* RAP 14.2[2], 14.1(c)[3].

> As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina—e.g., "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wash.2d at 835,

[2] "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review*." RAP 14.2 (emphasis added).
[3] "If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination." RAP 14.1(c).

> 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

Sinclair, 192 Wash. App. at 391-92, quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider "important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. In addition, if a person is considered indigent, "courts should seriously question that person's ability to pay . . . ." *Id.*

A trial court's finding of indigency will be respected unless there is good cause not to do so. *Sinclair*, 192 Wash. App. at 393; *see also* RAP 15.

In this case, Mr. Nowacki was found indigent and counsel was appointed for his trial, as well as this appeal. (CP 79-81). Mr. Nowacki is unemployed and has no assests. (CP 74-78). The trial court waived all non-mandatory fees. (CP 65-66). It is extremely unlikely that Mr. Nowacki will be able to pay appellate costs. Therefore, this Court should

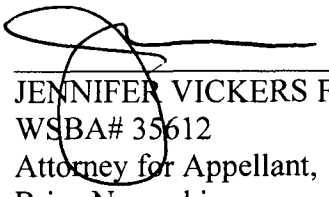
exercise its discretion and not award appellate costs in this matter, if Mr. Nowacki does not substantially prevail.

I. CONCLUSION

In conclusion, the trial court erred by improperly admitting hearsay statements that were not admissible as *Smith* affidavits, the officer gave improper opinion testimony regarding Mr. Nowacki's veracity and guilt, the State improperly argued facts not in evidence, and Mr. Nowacki received ineffective assistance of counsel by failing to object to errors. For all these reasons, Mr. Nowacki did not receive a fair trial and this matter should be reversed and remanded for a new trial.

Dated this 3rd day of January, 2017.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. BRICE NOWACKI, Appellant.	)	NO. 49163-0-II CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically to the following:

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Mary E. Barlow

Signed January 3, 2017 at Tacoma, Washington.

PIERCE COUNTY DEPARTMENT OF ASSIGNED COUNSEL

January 03, 2017 - 4:05 PM

Transmittal Letter

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Case Name: State of Washington v Brice Nowacki

Court of Appeals Case Number: 49163-0

Is this a Personal Restraint Petition? Yes ■ No

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Statement of Arrangements

Motion: ____

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Appellant's Brief with a Certificate of Service is attached.

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